EVELYN ALEXANDER

IBLA 76-296 Decided January 14, 1980

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application F-034694 in part and dismissing a protest against granting of patent pursuant to small tract application F-023498.

Affirmed.

1. Alaska: Native Allotments -- Contests and Protests: Generally -- Equitable Adjudication: Generally -- Public Lands: Classification -- Small Tract Act: Generally -- Small Tract Act: Classification

Where BLM classifies a 4-acre tract as suitable for disposal under the Small Tract Act, thereby segregating it from acquisition under other public land laws, then grants an individual a lease thereon with option to purchase, pursuant to which the lessee constructs buildings and occupies the tract, the protest and application of an Alaska Native, made for the first time 12 years later, will be rejected, as a matter of law and equity where the Native was claiming 160 acres of different land during the preceding 6 years, and had made no assertion of interest in the small tract, but rather had expressly acknowledged the existence of the leasehold.

APPEARANCES: Carmen Massey, Esq., Alaska Legal Services, Inc., Fairbanks, Alaska, for appellant; Robert K. Schraner, Esq., San Diego, California, for respondent/protestee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Evelyn Alexander has appealed from the decision dated September 2, 1975, by the Alaska State Office, Bureau of Land Management (BLM), rejecting her amended 160-acre Native allotment application as to a parcel of land, now designated as U.S.S. 4037, comprising 4.09 acres, and also dismissing her protest against the allowance of an earlier conflicting patent application for U.S.S. 4037 which had been filed by George Cooper prior to her allotment application.

On June 15, 1959, George Cooper applied for this tract pursuant to the Act of June 1, 1938 (the Small Tract Act), 43 U.S.C. § 682a (1976). As the land was unsurveyed at this time, he described it by metes and bounds. In his application, Cooper averred that he personally made an on-the-ground inspection of the tract, that the tract was not occupied, that it contained no improvements or indications of mining activity, and that it was not covered by any claim of record. Thereafter, at BLM's request, Cooper restated his metes-and-bounds description with greater precision.

On December 1, 1959, BLM officially classified the tract as suitable for lease and sale under the Small Tract Act, supra. On March 31, 1960, BLM issued its decision offering Cooper a lease of the tract for a period of 2 years, with an option to purchase it at the appraised value. On April 1, 1960, Cooper accepted the lease as offered, and BLM mailed it to him on April 28, 1960.

On November 18, 1960, Cooper filed his application to purchase this tract, 1/ and BLM examined it on June 9, 1961. The examiner subsequently recommended that Cooper be allowed to purchase the land after survey, stating that the appearance of the premises was "very neat," and that "the lessee has done an exceptional job on this tract especially in view of the fact that all building material had to be flown in to the site." Cooper's improvements consisted of a house 16 feet x 30 feet, an outhouse, and a shed. On June 16, 1961, BLM's lands and minerals officer concluded that Cooper's improvements met the requirements of the Small Tract Act, supra. On July 24, 1961, BLM requested that the tract be surveyed, as authorized by the Small Tract Act, so that it could be patented to Cooper. On March 5, 1968, U.S. Survey 4037 (U.S.S. 4037), which accommodated Cooper's small tract, was filed by BLM. On July 25, 1968, Cooper paid BLM $727.10, the cost of the survey (less a credit of $12 from earlier payment toward purchase) as the agreed purchase price of the tract.

BLM, however, withheld issuance of a patent to Cooper, because of a general protest by the Minto Council against issuance of patents in the area, owing to its asserted aboriginal rights to land there. On

1/ This application and its attachments are missing from BLM's records concerning Cooper's application.

March 21, 1969, the Juneau Area Office of the Bureau of Indian Affairs (BIA) advised BLM that the Minto Council had expressed its objection specifically to granting the patent to Cooper. On April 8, 1969, BLM advised Cooper that it would suspend further action on issuing a patent to him until the protest based on aboriginal rights was settled by Congress.

On August 3, 1965, Evelyn Alexander filed application F-034694 for allotment pursuant to the Act of May 17, 1906, as amended (the Alaska Native Allotment Act), 43 U.S.C. §§ 270-1 to 270-3 (1970). 2/ In this application, Alexander sought title to two parcels, designated parcels A and B, respectively. Parcel B, the larger of these, was adjacent to Cooper's small tract, but did not include it. In fact, in her original application, Alexander described Parcel B as follows:

> Parcel B: Beginning at a point on the east bank of Willow Lake at approximately 64 degrees 59'0" North Lat., 149 degrees 50'12" West Long.; thence northerly 20 chains to a point on the south bank of the Chatanika River; westerly along the south bank of said river to the east boundary of the George Cooper Small Tract (F-023498); southerly along said boundary to a point on the bank of said lake; southeasterly along the bank of said lake to the point of beginning. Containing 120 acres, more or less. [Emphasis added.]

Thus she not only recognized Cooper's tract by name, serial number, and type, she used one of his boundary lines to define the limits of her own claim. Inasmuch as her Parcel A included 40 acres, more or less, her application described a claim of 160 acres, the maximum allowable under the Alaska Native Allotment Act of 1906. The Realty Officer of the Bureau of Indian Affairs certified that she had "occupied, marked and posted the lands as stated in this application * * *."

BLM processed this application, found it to be acceptable on its face, obtained a report from Geological Survey showing the land to be valuable for oil and gas, and so informed her, and called upon her to submit proof of qualifying use and occupancy.

BLM also performed surveys of the two tracts described in her application at Government expense. 3/ Parcel A (U.S. Survey 4452-A) embraced precisely 40 acres, and Parcel B (U.S. Survey 4452-B) was

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2/ The Native Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1906), effective December 18, 1971, subject to applications pending on this date.

3/ Although purchasers under the Small Tract Act, among others, must reimburse the Government for the cost of having their land surveyed, surveys of Alaska Native allotments are performed by BLM at Government expense without reimbursement.

found to comprise 119.32 acres. These surveys were officially filed on June 25, 1969, and BLM formally notified Alexander of this. Alexander still had not filed proof of qualifying use and occupancy of these lands, and BLM again requested that she do so, noting that the time fixed by law for the submission of such proof would expire on August 3, 1971. On June 30, 1971, she filed her evidence of occupancy, using the official survey numbers to describe the lands claimed and occupied by her. She stated that she used these lands seasonally from 1937 to the present time for trapping, fishing, and hunting. She did not indicate the presence of any improvements on either tract.

At this point the record shows that both the Cooper small tract application and the Alexander Native allotment application were in good order, the only impediment being the unresolved protest against the Cooper conveyance by the Minto Council based on "aboriginal rights." However, on November 23, 1971, Alexander filed an amendment to her application and included the 4.09 acres held by Cooper within Survey U.S.S. 4037. In order to do this it was also necessary for her to reduce her claim to newly surveyed 40-acre Parcel A; U.S.S. 4452-A. She did this by excluding a portion of the lands (which she described by "approximate" courses and distances) from the official survey. She alleged occupancy of the Cooper tract from 1937 to date, explaining, "The improvement made by George Cooper (U.S. Survey 4037) was done after my occupancy began in 1937." Three days later, on November 26, 1971, counsel from Alaska Legal Services Corporation entered his appearance with BLM on behalf of Alexander.

On December 18, 1971, the protest of the Minto Council was vitiated, as the claim of aboriginal title on which it was based was extinguished by section 4(b) of the Alaska Native Claims Settlement Act, supra. On December 20, 1971, through her attorney, Alexander filed a protest of her own against the patenting of U.S.S. 4037 to Cooper under the Small Tract Act, supra, asserting superior rights to the land under the Native Allotment Act, supra. Thus, granting of patent to Cooper has been further prevented pending resolution of this protest.

On October 2, 1973, a BLM Realty Specialist examined Parcels A and B, plus the Cooper tract, in the company of Alexander and her husband. 4/ In his report of these examinations, the Realty Specialist explains his findings, which persuaded him that Alexander had used Parcels A and B as described and surveyed pursuant to her original application, but he could find no signs of use of the Cooper small tract which could be associated with Alexander. He reported that the Cooper cabin was in good repair and well maintained over the years; that it was evident that there had been a lot of activity on the small

4/ During this trip, in addition to appellant's two parcels, the BLM Realty Specialist also examined two other parcels of land which Mr. Alexander was seeking to have allotted to himself.

tract since it was leased in 1959; that there was equipment stored around the cabin; and numerous "No Trespassing" signs "were posted on practically every tree larger than 6 inches in diameter."

In the section of his report concerning the examination of Parcel A the Realty Specialist states: "Mrs. Alexander indicated that she had not been back to the parcel in at least five years because of the fact that she was getting old and could no longer do the things she once did as a young woman." While the foregoing cannot serve as the basis for a determination of Alexander's qualification, it is noteworthy because, if true, it has legal significance.

On September 2, 1975, BLM issued a decision rejecting Alexander's application as to U.S.S. 4037 and dismissing her protest against granting Cooper the patent to the tract. BLM noted that filed reports in the record show that Alexander had not occupied the land as alleged in her application, and that her submissions had not overcome these reports. The decision further noted that George Cooper had made extensive improvements on the tract and done all that the law required him to do to earn equitable title, that Alexander had been well aware of this, and had not amended her application to include the Cooper tract until November 23, 1971, at which time U.S.S. 4037 was not vacant unappropriated public land. The decision concluded that former occupancy of land by an Alaska Native is not qualifying under the Allotment Act, nor is occupancy which is not at least potentially exclusive of others.

From this decision Alexander (appellant) has appealed.

At the outset we observe that if the resolution of this case depended upon the determination of disputed issues of fact it would be necessary to afford notice and an opportunity for hearing in accordance with the doctrine established in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). However, we find this appeal to be controlled entirely by law and equity.

[1] The Small Tract Act of June 1, 1938, as amended (43 U.S.C. § 682a (1970)), authorized the classification for small tract purposes and, in its amended version, applied to lands in Alaska. In order to be suitable for such classification, the land must have been "vacant and unreserved." The classification order promulgated by BLM on December 1, 1959, pursuant to this authority, necessarily involved a finding that the land was vacant. As noted above, Cooper had declared under penalty of law that the tract was not occupied or improved when he filed his application in 1958. No contrary allegation was made until appellant amended her allotment application in November 1971, followed by her protest against Cooper's entitlement filed the next month. The house, shed, and outhouse were constructed on the property by Cooper in 1959, and constituted open and obvious evidence of his

occupancy thereafter, even to one who had no knowledge of the lease which had been granted him by BLM. Appellant, however, did have actual knowledge of his lease at least by 1965, when she first filed application for an allotment of the land adjacent, and acknowledged his lease and surveyed boundaries. In consequence of that application BLM caused her original Parcels A and B to be surveyed at Government expense.

Appellant's claim must be rejected as a matter of law. Regardless of the extent to which she may have used this 4.09-acre tract incident to her alleged use and occupancy of the other 160 acres in her original Parcels A and B prior to 1959, she was not entitled to have all the Federal land she may have so used in excess of 160 acres reserved to her during the course of her lifetime in the anticipation that she might someday decide to apply for allotment of that particular land in preference to some other land for which she was equally qualified. As we stated in Andrew Petla, 43 IBLA 186 (1979):

> An Alaska Native following the traditional Native way even for part of the year, might reasonably use and occupy several tracts of public land comprising in the aggregate, hundreds or even thousands of acres. Each year he might fish in one area, hunt waterfowl in another, moose in a third, pick berries in a fourth, gather wood in a fifth, careen his boat and repair his gear in a sixth, run a trapline on a seventh, and even follow a caribou migration route for miles over the same land each season. Arguably, under the Department's liberal construction of "use and occupancy" he could establish his qualification to any of this land by alleging that it was known as "his" campsite, fishing ground, trapping area, etc., on a seasonal basis for at least 5 years. But under the law, he could not apply for all of it; he could only seek up to a maximum of 160 acres. Therefore, if he desired an allotment, he was obliged to apply for the particular acreage he most wanted. The fact that he regularly visited the remaining land in pursuit of his various subsistence activities cannot affect the legal status of that land, or make it unavailable to any other lawful applicant * * *.

Certainly, in enacting the Native Allotment Act, it was the legislative purpose to make the Native inhabitants secure in their use and occupancy of lands, up to a maximum of 160 acres, against encroachment or ouster by non-Natives. As quoted by the Court of Appeals for the Ninth Circuit in Pence v. Kleppe, supra at 529 F.2d at 141:

Our holding is fortified by legislative history. In the Report to the Full House of Representatives from the

Committee on Public Lands which reported out the Alaska Native Allotment Act, the Committee said:

> The necessity for this legislation arises from the fact that Indians in Alaska are not confined to reservations as they are in the several States and Territories of the United States, but they live in villages and small settlements along the streams where they have their little homes upon land to which they have no title, nor can they obtain title under existing laws. It does not signify that because an Alaska Indian has lived for many years in the same hut and reared a family there that he is to continue in peaceable possession of what he has always regarded his home. Some one who regards that particular spot as a desirable location for a home can file upon it for a homestead, and the Indian or Eskimo, as the case may be, is forced to move and give way to his white brother. This has in some instances already worked severe hardship upon these friendly and inoffensive natives to the shame of our own race, due more to a lack of needed legislation than to wanton disposition on the part of those who have thus dispossessed them than it has been to deprive the natives of what must be conceded to be their rights. [emphasis added] H.R.Rep. No. 3295, 59th Cong., 1st Sess. (1906).

The use and occupancy which can give rise to this statutory protection, however, must be "substantially continuous" and "must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use." 43 CFR 2561.0-5.

> [B]ut the use or occupancy which gives rise to such a right must be notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the extent thereof must be reasonably apparent. [Citations ommitted.]

United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841, 844 (1948).

Here no physical evidence of appellant's use of the Cooper tract appeared, and no assertion of any such use was made by her until more than 12 years after the land was classified as suitable for disposition under the Small Tract Act, and more than 11 years after BLM had

granted Cooper a lease with a conditional option to purchase the land. After more than a decade, BLM's classification order, BLM's decision to grant the lease to Cooper, and BLM's decision that Cooper had earned the right to purchase under his lease-contract must be impressed with the stamp of finality. Had BLM actually issued the patent to Cooper -- as it would have done had it not been suspended pending disposition of the Minto Council protest -- appellant's claim to the Cooper tract would have been barred by the States's statute of limitations. There must be an end to administrative litigation also. Private rights as well as public cannot be indefinitely suspended. Orderliness in the administration of public lands demands finality for decisions which were not appealed or otherwise attacked for so long. As stated by Secretary Lamar some 95 years ago, "[T]he labors of the Department would become too cumbrous to admit of their intelligent discharge; uncertainty would cloud every inchoate title and, in many instances, vested rights would be endangered." Rancho San Rafael de la Zanja, 4 L.D. 482 (1886).

We agree with the decision below that appellant's alleged use and occupancy could not possibly have been exclusive, or even potentially exclusive, since 1959. Cooper has, since that time, used and claimed the land under a prima facie valid lease issued by BLM pursuant to statute and regulation. Appellant had actual notice of this, acquiesced in it, and acknowledged it in her 1965 application for the adjacent land. She obviously was not then claiming the small tract, as she was claiming her maximum entitlement of 160 acres of different land. Cooper constructed improvements, caused the tract to be surveyed, and maintained the property, and his possessory right was a matter of record. By contrast, appellant's alleged use was unknown, undetectable by Cooper and BLM examiners, and unasserted by appellant. Clearly, even if it be true that appellant used and occupied the tract between 1959 and 1971, Cooper's use and occupancy was the dominant one, and she was not then a claimant to the land. As noted before, the classification of the land for small tract disposition segregated it from appropriation under any other public land law. Had appellant filed a Native allotment application first, that would have segregated the land in her favor, so as to have precluded the allowance of Cooper's small tract application. Norma E. Richards, 43 IBLA 288 (1979); 43 CFR 2561.1 (e). This was not done. Appellant's alleged use and occupancy of the Cooper small tract, as well as her original Parcels A and B, was for moose hunting, trapping, ratting, fishing and berrying. It is apparent that for these purposes no very substantial use could be made of the improved 4.09-acre tract while sharing occupancy with Cooper, and certainly any such use could not be considered exclusive or potentially exclusive. In our recent decision in Mildred Sparks, 42 IBLA 155, 159 (1979), we held that a long period of nonuse tends to vitiate any effective qualifying use and occupancy which may have preceded the long period of nonuse. We then stated:

> Thus, where as here there are no improvements on the site, the use was spotty, highly intermittent, and limited to

> food gathering, hunting, and fishing, uses which might be done on much of the public domain in Alaska by many Natives without evidencing any possession of the land exclusive of others, and the lengthy period of nonuse demonstrates that the land has not been needed for subsistence purposes for years, it is reasonable to deny an allotment.

We conclude that appellant's alleged use and occupancy of the Cooper small tract since 1959, while it was also occupied by Cooper, and at a time when she was claiming her maximum entitlement of 160 acres of different land, is nonqualifying as a matter of law.

Appellant's claim to the small tract is also barred by equity. The closely related doctrines of estoppel by laches, estoppel by matter in pais, and equitable estoppel are all operative against appellant's claim. If she had a right or claim to this particular 4.09 acres in 1959, she had a duty to assert it promptly when Cooper entered and took possession under his Federal lease. Perhaps she was unaware of his interest at the time he built the house, shed and out-house, but it was years after that, in 1968, when he paid the United States $727.10 for performance of the survey. BLM would not have ordered the small tract surveyed had there been a conflicting claim, and Cooper would not have incurred this expense. Thus, appellant's failure to assert or enforce her alleged interest in the land for 12 years was directly responsible for Cooper's expenditures for this and other expenses, such as maintenance. Not only did she fail to assert her claim for a dozen years, but in 1965, when she filed her own application for adjacent land, she expressly recognized Cooper's claim, and asserted that she was claiming her maximum possible entitlement.

Moreover, BLM, acting in response to her 1965 application, caused her original Parcels A and B to be surveyed at public expense. Her amendment, if allowed, would destroy the efficacy of U.S.S. 4452-A (the 40-acre parcel) by carving out a portion roughly equivalent to the Cooper small tract and describing the excluded portion by metes and bounds. Although the BLM examiner opined that a resurvey would not be necessary to accommodate this change, we disagree. Appellant's excuse for amending her application so as to exclude this land and claim the Cooper tract instead is "because she felt the southern end is in the lake and covered with water." Although no effort has been made to verify this belief of appellant's, it must be remembered that an official, approved survey has been made of the entire tract. Surveys do not include lands which are in a lake and covered with water. Indeed, one of the purposes of a survey is to define the upland and exclude the beds of water bodies. Therefore, unless the survey was incorrectly performed, the entire 40 acres in appellant's original Parcel A are fast land, not lakebed. Moreover, there is a legal presumption of regularity which supports the official acts of public officers and,

absent clear evidence to the contrary, it will be presumed that they have properly discharged their official duties. United States v. Chemical Foundation, 272 U.S. 1, 15-16 (1926). As there is no scintilla of evidence that the survey U.S.S. 4452-A was incorrectly performed and erroneously approved, appellant should not be permitted at this stage to amend her application for reasons of caprice, whimsy, or unsupported supposition. 5/

Moreover, even assuming, arguendo, that appellant could demonstrate that she had fully qualified to receive an allotment of land which included this small tract, we could not approve it being granted her. Under the express terms of the 1906 Alaska Native Allotment Act, allotments are made at the discretion of the Secretary. 43 U.S.C. § 270-1 (1970). This legislative authority invests the Secretary with the power to prevent the imposition of such gross inequity as would result were we to condone appellant's effort to eradicate rights established by Cooper's good faith full compliance with the Small Tract Act, the provisions of the regulations, and the terms of his lease. To do so would so violate notions of basic fairness as to be unconscionable. Accordingly, we conclude that BLM properly recognized Cooper's equitable interest in this tract.

Finally on remand, BLM should readjudicate the qualifications of Alexander to receive an allotment of any of the other land for which she has applied. It will be remembered that following his examination of Parcel A in company with the Alexanders in 1975, the BLM realty specialist reported that appellant told him that she had not visited the tract for "at least 5 years" previously. If such nonuse of this land has continued, it would now amount to at least 10 years. As hereinbefore noted, the legislative purpose of the 1906 Allotment Act (since repealed) was to make Alaska Natives secure in their possession of lands which they were actually using and occupying and which were needed by them for some purpose. The Act was never intended as a vehicle by which Natives could receive gifts of nontaxable public lands which they had not used, occupied or needed for many years, and we have held that one who has abandoned the land is disqualified to be granted it as an allotment. Mildred Sparks, supra, and cases therein

5/ Another reason for appellant's last minute decision to amend is reflected in the report of the Realty Specialist and in appellant's statement of reasons for appeal. Appellant is reported to have said that she "allowed" Cooper to use the land within U.S.S. 4036 because of the amicable relationship between them. However, Cooper has since assigned his interest one Fred Shikora, who in turn assigned half the tract to another. The Alexanders are said not to be able to get along with the present occupants of the Cooper tract. However, in light of our holdings, it is immaterial whether this is the true reason for appellant's amendment of her application.

cited. Recognizing that under the Pence doctrine the examiner's report cannot serve as the basis of a final adjudication, Alexander must be afforded notice and opportunity for hearing. See Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed and the case is remanded for further action consistent with this opinion.

Edward W. Stuebing
Administrative Judge

I concur:

Frederick Fishman
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

I do not agree with the conclusion of the majority that appellant could not, as a matter of law, qualify for an allotment of the 4.09 acre tract which is the subject of the appeal. Nevertheless, I feel that the equitable considerations which the majority raise, and which are made manifest by the record, must ineluctably lead to the conclusion that even were appellant able to show compliance with the provisions of the Native Allotment Act, which she has not yet done, it would be an abuse of discretion to grant the allotment application within the specific factual structure of this appeal. Accordingly, I concur in the result reached in the majority decision.

James L. Burski
Administrative Judge